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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 17-0533 EMC
)	
JONATHAN JOSEPH NELSON, et)	
al.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Wednesday, October 6, 2021

TRANSCRIPT OF REMOTE VIDEOCONFERENCE PROCEEDINGS

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Wednesday - October 6, 2021

9:01 a.m.

P R O C E E D I N G S

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THE CLERK: Court is now in session. The Honorable Edward M. Chen is presiding.

Calling Criminal Action 17-5333, United States of America versus Jonathan Joseph Nelson; Raymond Michael Foakes; Russell Allen Lyles; Jeremy Daniel Greer; Brian Wayne Wendt; Russell Taylor Ott; Christopher Ranieri; Damien David Cesena; Brian Allen Burke; David Salvatore Diaz; and Merl Frederick Hefferman.

Counsel, please state your appearances for the record, beginning with counsel for the Government.

MR. BARRY: Good morning, Your Honor. Kevin Barry, Ajay Krishnamurthy, and Lina Peng for the United States.

THE COURT: All right. Good morning, Mr. Barry and company.

THE CLERK: Counsel for Defendant Nelson.

MR. GOHEL: Good morning, Your Honor. Jai Gohel and Richard Novak for Mr. Nelson. I believe Mr. Nelson is listening on the Zoom as a public member.

THE COURT: All right. Thank you, Mr. Gohel.

MR. CLOUGH: Good morning, Your Honor. Michael Clough on behalf of Mr. Lyles. I don't think he is on yet, but he will be and his time is waived for when -- until he gets on.

1 **THE COURT:** All right. Thank you.

2 **THE CLERK:** He is on.

3 **MS. AMRAM:** Good morning, Your Honor. Galia Amram and
4 Whitney O'Byrne on behalf of Damien Cesena, who is present on
5 the Zoom.

6 And, Your Honor, I have to drop at 11, unfortunately, but
7 Ms. O'Byrne will be on for the duration.

8 **THE COURT:** All right. Well, hopefully, we'll all be
9 off by 11, but we'll see.

10 **MR. WAGGENER:** Good morning, Your Honor. This is
11 Robert Waggener, and Marcia Morrissey and I represent
12 Russell Ott. Russell Ott is the seated to my left over here in
13 my office with me, so he is obviously in attendance for this
14 hearing.

15 **THE COURT:** All right. Thank you, Mr. Waggener.

16 **MS. POLLOCK:** Thank you, Your Honor. Randy Sue
17 Pollock appearing on behalf of Jeremy Greer, who is listening
18 to the proceedings.

19 **THE COURT:** Thank you, Ms. Pollock.

20 **MR. WALSH:** Good afternoon, Your Honor. John Walsh on
21 behalf of Christopher Ranieri, whose presence is waived.

22 **THE COURT:** Thank you, Mr. Walsh.

23 **MR. THOMSON:** James Thomson on behalf of David Diaz,
24 who is participating via zoom, Your Honor -- or telephone.

25 **THE COURT:** All right. Thank you, Mr. Thomson.

1 **MR. BABCOCK:** Good morning, Your Honor. Erik Babcock
2 for Brian Burke, who should be joining, if he hasn't already,
3 and appearing, listening by zoom.

4 **THE COURT:** All right.
5 Angie, do you see him?

6 **THE CLERK:** I do not see a Brian Burke as an attendee
7 yet, Your Honor.

8 **MR. BABCOCK:** He's attempting -- he will join and I'll
9 waive his appearance until he gets on, Your Honor.

10 **THE COURT:** Thank you, Mr. Babcock.

11 **MR. BABCOCK:** He just texted me.

12 **THE COURT:** Okay.

13 **MR. BUSTAMANTE:** Good morning, Your Honor. James
14 Bustamante appearing on behalf of Merl Hefferman, who is also
15 present via the Zoom.

16 **THE COURT:** All right. Thank you, Mr. Bustamante.

17 **MR. PHILIPSBORN:** Good morning, Your Honor. Alex
18 McClure and John Philipsborn for Mr. Wendt, who is present by
19 video hook-up from the detention facility.

20 **THE COURT:** All right. Thank you, Mr. Philipsborn.

21 **MR. BORO:** Good morning, Your Honor. Albert Boro
22 appearing for Raymond Foakes, who is present in custody at
23 Santa Rita Jail, and is attending by Zoom.

24 **THE COURT:** All right. Thank you, Mr. Boro. Welcome
25 to the case.

1 **MR. BORO:** Thank you, Your Honor.

2 **THE CLERK:** I believe we have everyone, Your Honor.

3 **THE COURT:** Okay. All right. Thank you, everyone.

4 So no objection to proceeding by Zoom; correct?

5 **MR. NOVAK:** Correct.

6 **THE COURT:** Hearing none -- all right. I hear none.
7 We'll proceed.

8 Let me first address the -- Mr. Thomson's status report.

9 So I see that the Government has eliminated a number of
10 items that it has confirmed will not be used, but there was --
11 maybe I can get an update just to make sure I understand the
12 stipulation about the forensic download.

13 **MR. THOMSON:** Yes, Your Honor. With respect -- just
14 to go back to the line items that -- or the evidence that will
15 be used/not be used.

16 I just want to stress for the Court that, as of now, there
17 are 672 line items of evidence, which is not individual pieces
18 of evidence, but just the line items containing evidence that
19 have not been designated "not to be used" or in other words,
20 may be used at trial at this point in time.

21 **THE COURT:** All right. Is there any expected further
22 culling at this point or is this -- what's the Government's
23 view?

24 **MR. BARRY:** Well, Your Honor just one, actually,
25 question.

1 I don't know if the 672 includes the pieces of computer
2 equipment because that was something that, you know, in the
3 thousands -- I think it was 1,088 or something like that,
4 which -- that Mr. Thomson identified or, you know, we actually
5 identified and then the defense said "Here are all the evidence
6 items we have, or line items we've got."

7 So I don't know if this 672 remaining include those, and
8 if they do, again, those aren't going to be actual, physical
9 pieces of evidence. We're going to seek to introduce the
10 forensic extractions through -- hopefully, through stipulation,
11 but, you know, through a witness who says, you know, this is --
12 this was seized from this person on this date.

13 So if they -- if the 672 include those -- if that number
14 includes those devices, then it actually will be less.

15 But we don't think that there is going to be another great
16 culling. You know, again, as we proceed through preparation,
17 get our exhibit list together and even, like, prep for trial,
18 stuff will, obviously, fall off because, you know, there -- we
19 might not need all these photographs, or all these pieces of
20 evidence. But, right now, I think, the larger culling is done.
21 If there are significant things that we're not going to use,
22 we'll let the defense know.

23 **THE COURT:** Okay.

24 **MR. THOMSON:** The 672 items does include the computer
25 information. It's a complete list of all the evidence that we

1 viewed at the various evidence viewings. I don't know what
2 percentage of those are computer matters compared to physical
3 evidence. But even if you take out those computer items, there
4 is still probably at least 500-and-some-odd line items of
5 evidence that either the Government is going to need to further
6 cull, or I just can anticipate a lot of in limine motions or
7 motions to exclude or preclude those items as, I guess, Group 1
8 gets closer to trial.

9 **MR. BARRY:** So, Your Honor, what it shows is that
10 we've actually cut in half the issues for evidence. And if
11 there is a particular piece of evidence the Group 1 defendants
12 object to, then why don't we litigate that now, you know, as we
13 have been trying to do as much pretrial litigation as possible
14 as far out as possible, you know.

15 If the -- this gets into the motion to continue the trial,
16 but the defense has resisted that at every turn; not
17 Mr. Thomson, but the defense in general. We've worked quite
18 well with Mr. Thomson trimming the discovery with the searches
19 and everything, so -- but, yeah, if there are pieces of
20 evidence that the Group 1 defendants say, "Hey, this shouldn't
21 come in," then let's schedule those motions in limine right
22 now. We don't have to do it this week, in terms of the
23 motions, but let's get a date to get them on file long before
24 the trial.

25 **MR. THOMSON:** Your Honor, I'm not going to speak for

1 Group 1 with respect to how they want to handle that. All I'm
2 saying is that there are those many items left, and I have
3 been, from the beginning, asking the Government to please give
4 us the actual list that they are going to use so that the
5 defense can then make a decision as to whether or not to try to
6 preclude or exclude them, or live with them, because they're
7 fine as evidence for the defense.

8 So Group 1 can address Mr. Barry's comment about
9 individual items. I'm just letting the Court know that there
10 is that many line items left, and the Government has actually
11 reduced it by 38 percent, not by half.

12 **THE COURT:** Right.

13 **MR. THOMSON:** And that has been because we have been
14 constantly on this in terms of trying to get the list up. So
15 that's as to item one.

16 As to item two --

17 **THE COURT:** Let me just, before we leave that, just to
18 preview, we're going to want to build in -- I'm going to want
19 to build in, number one, a time when the Government will have
20 to identify its exhibit list so that there can be motions in
21 limine. We're not going to have motions in limine in the
22 blind. So that's got to be done early too.

23 And I'm all for doing this not two weeks before trial.
24 This is going to be done in advance of trial. So we'll figure
25 that out.

1 **MR. THOMSON:** Okay.

2 **THE COURT:** Thank you.

3 **MR. THOMSON:** As to item two, it brings up the notice
4 of inability to comply with joinder that I filed in item three
5 on the status report.

6 I can't speak to the stipulations because I have not seen
7 them. I don't know how many stipulations were done with
8 respect to the forensic download of a particular item. So
9 maybe Group 1 can speak to them.

10 And if we continue to be boxed out of that discussion,
11 then, I guess, that's something that Group 1 has to do with
12 the Court without the rest of counsel being involved, which I
13 object to. But I have no comment on number two, other than to
14 let the Court know that I've been informed that some
15 stipulations were provided to Group 1 counsel.

16 **THE COURT:** Okay. And with respect to your third
17 item?

18 **MR. THOMSON:** Yes, Your Honor.

19 I mean, it's gotten to the point -- and, you know, I
20 understand there is court orders in place and everything else.
21 And I'm not trying to do anything except to notify the Court
22 that this is getting extraordinarily difficult for us -- I'll
23 speak for all non-Group 1 counsel -- to feel like we're really
24 participating in the case at this point.

25 Because there are -- I mean, we don't have motions to

1 continue the trial. We had one document that was filed by
2 Mr. Wendt's team that gave us part of it, but the memorandum
3 was filed under seal.

4 We don't know whether there was another motion to continue
5 trial filed or not. The Government alludes to a motion --
6 another motion to continue trial in its pleading that it filed,
7 which some of us got; perhaps all counsel got that.

8 But we don't know whether there was a third motion to
9 continue trial filed. We don't know whether there has been an
10 opposition to some of the co-conspirator log. We don't know
11 whether there has been replies to motions. And for some
12 reason -- and I'm not really sure about this -- we don't even
13 know the status, kind of, of the jury record motions, which
14 have always been kind of open to everyone. I mean, since *Test*
15 *versus United States*. So we're just -- we're kind of at a loss
16 as to what to do.

17 And as stipulations get decided without Group --
18 non-Group 1's input and other matters get litigated, no one is
19 going to keep track of this stuff for the non-Group 1
20 defendants.

21 I'm sure -- you know, the Court is not going to keep track
22 of all the things that were decided that may have affected
23 non-Group 1 folks. The Government is not going to do that.
24 And certainly defense counsel, they got enough to do that they
25 are not going to be doing that. We're going to end up at the

1 end of this trial without knowing what has been litigated and
2 how to proceed.

3 And I just don't, my request is that we be given
4 everything as well as Group 1 so that we can perform our part
5 of the JDA, and that we can assist Group 1 clients and counsel
6 with respect to issues that may come up, you know, that relate
7 to our particular client or that relate to other aspects of the
8 case, and that we be allowed to assist them, and that we be
9 allowed to benefit from what is going on in the case in terms
10 of the litigation.

11 I know that there is generally just a whole host of issues
12 with respect to some of the latest discovery that has been
13 produced, some of which we get, some of which we don't get. I
14 don't know what we don't get, but I know it's creating a
15 bottleneck of sorts between the discovery coordinator and the
16 Government's discovery person. And they are working on it.
17 I'm not saying anybody is not working on it.

18 But we don't even know what's happening. So for us to be
19 kind of put on the outside and not know what's happening is
20 really creating a difficulty for the non-Group 1 defendants,
21 and I think it's also harming the Group 1 defendants because
22 they are not getting our benefit.

23 I fully respect an attorneys' eyes only order. We've
24 lived with them all the way through. There are individuals
25 that also don't think that we should have attorneys' eyes only

1 on some stuff, but I'm not asking about that now. I'm just
2 asking to be given everything that Group 1 has so that we can
3 coordinate and work together in getting this case done.

4 So that's my request.

5 **THE COURT:** All right. Let me hear the Government's
6 response.

7 It seems like there is sort of two buckets here. There is
8 stuff that has the AEO materials that's confined to Group 1
9 counsel; that's sort of one category of stuff. And then we
10 have sort of just motions work and other things that may or may
11 not pertain to the AEO Group 1 counsel issue.

12 What are your -- what's the Government's view about
13 sharing these or at least some of these documents, pleadings
14 with the rest of the counsel?

15 **MR. BARRY:** Well, with respect -- thank you, Your
16 Honor.

17 With respect to the first bucket, I think that should be
18 and should remain cabined with the Group 1 defendants because
19 of the witness safety issues; you know, there are some
20 significant issues there. The -- so that, that should be in
21 place.

22 With respect to the non-AEO materials, if there are issues
23 that affect the non-Group 1 defendants, the Government has
24 given them our pleadings. Like, the motion to continue the
25 trial, we gave everyone our opposition because it affects

1 everyone.

2 But, you know, the motions in limine, motions, you know,
3 stipulations, the Court's rulings on evidence, the Court's
4 rulings on particular pieces of evidence for this trial, you
5 know, aren't necessarily going to be law of the case.

6 You know, if the Group 1 defendants agree to stipulate to
7 some foundational issues in terms of the electronic devices
8 that, you know, this image is a correct forensic image of what
9 was seized on this date, that will speed up the trial for
10 Group 1.

11 If the group -- if the Group 2 defendants, for whatever
12 reason, don't want to agree to that, that's on them; but they
13 are not going to be bound by that.

14 Evidentiary rulings that the Court makes in Group 1,
15 you know, we will -- there may be a reason for the Court to
16 change its mind, and the Group 2 defendants can bring that up
17 at that time. But rulings that the Court is making now with
18 respect to Group 1 won't necessarily affect the remaining
19 defendants because they're -- they will have the opportunity to
20 conduct their trial the way they want.

21 **THE COURT:** I guess my question is: What's the
22 opposition?

23 I mean, you say, well, they may not need it, but what's
24 the harm if -- aside from the AEO witness safety stuff, what
25 harm is there in -- so that, you know, by disclosing it, we

1 obviate the question whether it will or will not -- and I don't
2 want to get into the thing about what's useful and what's not.
3 I don't know if that's for me to decide.

4 But what's -- what's the danger in disclosing, other than
5 the witness safety stuff?

6 **MR. BARRY:** Yeah. There isn't a witness safety
7 danger. It's more of an administrative issue for the
8 Government. Frankly, it's easier to deal with three defense
9 teams than it is to deal with 11.

10 And, again, not just the administrative issue, but, you
11 know, it doesn't affect the Group 2 defendants -- like the
12 trial scheduling issues on the other -- except for trial
13 scheduling issues. But the evidentiary rulings, the motions in
14 limine, even the jury instructions -- you know, as I indicated,
15 I think, in back in December, you know, we want to get some
16 litigation on critical jury instructions, like Pinkerton.

17 If the Court says, you know, these are the forms of the
18 instructions for trial one, and we go to trial, the jury is
19 instructed on those, Group 2 can say: You know what,
20 Your Honor, we think you got it wrong in this respect and we
21 want these instructions.

22 So it's not necessarily harm. It's more of an
23 administrative issue.

24 Oh, and we're -- we don't oppose --

25 **THE COURT:** And the administrative burden is simply

1 copying -- serving the other -- other sets of counsel, the
2 other eight counsel?

3 **MR. BARRY:** Yeah. And we have actually done that,
4 Your Honor.

5 We've given -- you know, as I indicated, we have given the
6 materials pertaining to the trial group -- I'm sorry, the trial
7 scheduling to Group 1. And, in fact, I think we gave
8 Mr. Thomson the stipulations he was talking about, I think we
9 gave those to him on Sunday.

10 So, yeah, when it affects them, we're happy to include
11 them, but --

12 **THE COURT:** All right. What's -- go ahead.

13 **MR. THOMSON:** Your Honor, I don't think -- I may be
14 wrong, but the Government gave us notice of the fact that the
15 stipulations had been given to Group 1 counsel. I don't recall
16 there being an attachment where the actual stipulations were
17 there. But if that's the case -- I mean, I'll check, and if
18 that's the case, that's fine, we have those.

19 But, regardless, these are -- I mean, if we're just
20 talking about the pleadings now, these are ECF documents of
21 some sort. It doesn't -- it's not an administrative burden to
22 hit -- serve all, versus serve three. I mean, that just
23 doesn't make sense.

24 And the Court is going to be informed by this litigation
25 in a way in which we're not going to know about. So it's one

1 thing, we get the ruling and the Court -- we get the final
2 packet of instructions, say, for example, that the Court has
3 issued in the trial one -- Group 1. Okay? We get that.

4 We don't know what litigation was brought to get those
5 final packets together, so we're not going to have the benefit
6 of what Mr. Waggener and Mr.--

7 **THE COURT:** No. I understand your point.

8 **MR. THOMSON:** Okay.

9 **THE COURT:** I understand your point.

10 What I want to find out is whether there is any opposition
11 from Group 1 counsel.

12 **MR. PHILIPSBORN:** Your Honor, Philipsborn for Wendt.

13 Just on two matters, and I certainly invite my old friend,
14 Mr. Thomson, to correct me.

15 One thing that he mentioned was pleadings related to jury
16 challenges. And I've just checked the e-mails, all of the
17 pleadings that I can tell you the joint defense lawyers filed
18 went to all defense counsel.

19 It's true they are filed under seal, but that's a separate
20 issue. They are protected from public view because of court
21 requirements, but I'd -- so it may be that there are some items
22 that Mr. Thomson is specifically concerned about insofar as
23 those pleadings are concerned, that I certainly welcome his
24 information about.

25 And it is true that the Court has insisted that certain of

1 its records be maintained under seal. But, again, I got
2 permission to disseminate those that were sent to me, to other
3 counsel. So I just want to assure colleagues that they have
4 what their defense representatives have sent out.

5 And on the stipulation issue -- and, again, this is just a
6 respectful point of information for colleagues. And speaking
7 only for Team Wendt, we did receive a proposed stipulation on
8 electronic items. I have no knowledge of that particular
9 suggested stipulation being acted on. And the -- the Wendt
10 defense is going to be replying to the Government, but not in
11 the form of a -- of an acceptance of the stipulation as it's
12 currently framed.

13 **THE COURT:** Do you see a reason -- but now that --
14 those communications are between Group 1 counsel and
15 the Government, correct, not copied to other counsel?

16 **MR. PHILIPSBORN:** Your Honor, on the matter of the
17 stipulation specifically, that's correct; as far as I can see
18 by looking at the stipulation, as I am now.

19 **THE COURT:** All right. So from what you've seen, do
20 you have any objection or do you see any reason that, although
21 they are not involved in the discussions and the negotiations,
22 but, nonetheless, they are in the case, why other counsel
23 should not be privy?

24 **MR. PHILIPSBORN:** Your Honor, again, speaking only for
25 Mr. Wendt, were I in Mr. Thomson's position, I would be making

1 exactly the same objections he is. And I, personally, don't
2 see the reason that they are not privy to information, with the
3 sole exception that under -- that there are situations in which
4 a defendant will be filing information under seal for
5 correction -- I'm sorry -- for consideration by the Court,
6 usually ex parte, which, obviously, would not be served.

7 But everything else, as far as I'm concerned and Team
8 Wendt is concerned -- without having checked in with my
9 esteemed co-counsel, Ms. McClure -- but I don't see us having
10 any objection to that.

11 And I think it would make more sense. Because, as
12 Mr. Thomson points out -- and Mr. Novak before that, at prior
13 hearings -- there are instances in which we're actually trying
14 to get some assistance from our co-counsel on certain matters,
15 but we are limited by the fact that we're not able to talk
16 about certain contents of pleadings because they're,
17 ostensibly, filed under seal. And so we're -- so I'm sorry for
18 rambling. No objection.

19 **THE COURT:** Let me ask you -- let's take some, for
20 example, here.

21 The motion to continue trial, or the motions to continue
22 trial, would it be your view that some of that, like the
23 memorandum of points and authorities, should be shared, but not
24 the declaration? What's your view of that?

25 **MR. PHILIPSBORN:** Your Honor, on that specific matter,

1 for Wendt, for Team Wendt, the only reason that the memorandum
2 is under seal is that it makes reference to AEO material, and
3 so that's the reason that it's under seal. Otherwise, we
4 wouldn't have any objection to the dissemination of that.

5 The declaration that was filed in support makes reference
6 to very specific privileged matters and it was filed so that
7 Your Honor would review it and no one else. We would have
8 objections to the dissemination of that particular item.

9 But on all of the pleadings that we've filed to date that
10 have been kept from our colleagues, that's the only one I can
11 think of immediately that the Wendt defense has filed that I
12 think we would have an objection to disseminating; otherwise, I
13 think our colleagues are entitled or should be getting the
14 others.

15 **THE COURT:** And that would include -- I'm looking at
16 this list here -- defense expert disclosures, motion to exclude
17 co-conspirator statements, motion to suppress?

18 **MR. PHILIPSBORN:** Your Honor, again, speaking for the
19 Wendt defense specifically, I don't see why those are currently
20 not being disseminated.

21 **THE COURT:** All right. Let me ask other Group 1
22 counsel if anybody has a different view.

23 **MS. MORRISSEY:** Your Honor this is Marcia Morrissey
24 speaking.

25 **THE COURT:** Yes.

1 You just muted yourself. Okay. There you go. No, back
2 the other way.

3 **MS. MORRISSEY:** All right. The motions to suppress do
4 refer to unredacted copies of search warrants. And I realized
5 that when I -- you know, upon filing it, that, having done
6 that, I had made a document that I could not share.

7 **THE COURT:** Yeah. All right.

8 With the exception of something like that, do you see any
9 reason not to share pleadings?

10 **MS. MORRISSEY:** No, Your Honor, none. I would prefer
11 being able to share pleadings because I think it is to
12 everybody's best interest.

13 **THE COURT:** Okay.

14 **MR. WAGGENER:** Your Honor, this is Bob Waggener. I
15 have a point to raise.

16 In terms of the stipulation, Mr. Krishnamurthy gave -- or
17 sent out to Group 1 a proposed stipulation, on September
18 the 30th regarding the electronic device that sets out about 50
19 different devices where he is seeking a stipulation in terms of
20 the imaging, whatever.

21 I have no problem, conceptually, with sharing that with
22 the other co-counsel in the case. I note -- and I think there
23 is a real reason to do that because, for instance, one of the
24 devices would be a telephone of a co-defendant who is not in
25 Group 1.

1 On the other hand, I'm looking at the stipulation now, and
2 there is also identification of individuals that may not -- may
3 be subject to AEO protections or Group 1, walled-off disclosure
4 issues, in terms of material that we have received that the
5 other eight defendants have not received.

6 So there is, I understand, some level of sensitivity also.

7 **THE COURT:** Well, all right.

8 **MR. THOMSON:** Your Honor, if I might.

9 I will check with Mr. Philipsborn about the jury
10 disclosure stuff. And if I -- if that was wrong and we've
11 received that, then I apologize to the Court.

12 But -- and I appreciate whatever the Court can do in terms
13 of giving us pleadings and stuff, but given what Mr. Waggener
14 has just said, what Ms. Morrissey just said, and actually both
15 of those raise the point of: I do not understand why this
16 group of attorneys cannot be given all of the stuff that
17 Group 1 attorneys are given, even if it is AEO.

18 Because we will keep it AEO. It doesn't hurt us to have
19 it even -- at the same time that Group 1 gets it. We're not
20 going to do anything with it. So it's going to be secure just
21 as if Group 1 got it in secure.

22 And if that's going to create then, you know, a
23 stipulation, but the stipulation is not going to have all the
24 names it; or we're going to get a motion to suppress, but the
25 motion to suppress doesn't have all the names it and stuff -- I

1 really do ask the Court to reconsider its ruling on the -- with
2 respect to dividing Group 1 from the other defendants, and that
3 we be provided all information at the same time under whatever
4 strict AEO provisions the Court wants us to follow, and we will
5 follow them.

6 **THE COURT:** All right. Your response, Mr. Barry?

7 **MR. BARRY:** Thank you, Your Honor.

8 Actually, you know, the timing of Mr. Thomson's request is
9 unfortunate for the strength of his argument, because I don't
10 know if the Court's division of Group 1 versus non-Group 1
11 defendants was before or after Judge Kim's findings. But I
12 think the reason that the Court restricted materials to Group 1
13 is to preserve and address those -- you know, those witness
14 safety concerns, and the problem within it, leaks, either
15 deliberate or inadvertent.

16 So I think the Court's -- the basis for the Court's ruling
17 was correct. It was strengthened by the recent order to show
18 cause findings, and we think it should stay in place.

19 If the Group 1 defendants want to share materials, I
20 think, just like Ms. Morrissey and Mr. Waggener identified, if
21 there are materials that they need to excise, then they know
22 what that is, and they can do that.

23 But I think the Court shouldn't reconsider its careful
24 ruling in deciding who gets what and -- because the reasons for
25 that have only become more stark.

1 **THE COURT:** Well, let me ask you: Other than the OSC
2 proceeding, and we'll call it "the incident" about which that
3 proceeding was held, does the Government have any -- any
4 evidence that there has been a breach of AEO by current
5 counsel?

6 **MR. BARRY:** Other than -- no, we do not.

7 **MR. CLOUGH:** Your Honor, can I --

8 **THE COURT:** Yeah, briefly.

9 **MR. CLOUGH:** -- just add quickly.

10 One, I, obviously, strongly endorse Mr. Thomson's
11 position.

12 To be honest with you, having followed this closely, I'm
13 actually confused as to what the restrictions are, because I
14 didn't think the Court's orders had actually created a
15 restriction that made it impossible to share pleadings. And to
16 the extent that there is a problem with pleadings, those
17 problems could be solved, it would seem to me, in most cases,
18 by redactions.

19 So I've been confused by the fact that we haven't been
20 served with all of these pleadings. I share all of
21 Mr. Thomson's views.

22 I also, obviously, have strong views of the AEO, and I
23 think that needs to be litigated later. But I don't think we
24 need to go into that now.

25 Right now, I think the main thing is we need to know what,

1 actually, the Court's rulings are on the question of pleadings.
2 Because Mr. Thomson is right, there is no way we can assist
3 Trial Group 1 when we don't even know what's being litigated
4 and we don't know what the evidence is that might affect our
5 clients.

6 **THE COURT:** All right.

7 Here is what I want to do --

8 **MR. BARRY:** Sorry, Your Honor, just to clarify one
9 point.

10 Actually, there was, actually, a breach of the AEO in
11 addition to the OSC, in that, one of the -- actually, one of
12 the counsel for Group 1 publicly identified someone in open
13 pleadings who was named in AEO materials. The details were
14 shared of what this person told investigators and who this
15 person was, identified by name.

16 So the Government views that as a breach.

17 **THE COURT:** Okay. So here is what we're going to do:
18 I think the reason for the AEO Group 1 restriction was just
19 risk analysis, that the more people that have sensitive witness
20 safety sensitive stuff, whether inadvertently or however, that
21 increases the chances. And the need for it is not urgent yet
22 because, you know, the trial of the other non-Group 1
23 defendants is a bit away.

24 On the other hand, there will be -- and there has already
25 been some indication of a need to have exceptions to that for

1 Group 1 defendants in their preparation. And that's been done,
2 and I understand that's to be done on a kind of case-by-case
3 basis.

4 But I don't see and I, frankly, I agree with Mr. Clough.
5 I'm not sure, when I issued an order, it was about witness
6 safety stuff. I didn't -- maybe it was overabundance of
7 caution I'm not sure how we got to this point where pleadings
8 apparently, maybe, you know, just to stay clear of the line,
9 were not being shared.

10 I don't see a reason why pleadings are -- shouldn't be
11 shared, so long as witness safety stuff -- at least for now --
12 and I may lift that AEO, we'll see -- as long as there is
13 redactions. So what I want is -- I want the Group 1, somebody
14 from the Group 1 defendants to look at or, you know, to look at
15 these documents that apparently have been withheld and figure
16 out which or what portions can be released.

17 It sounds like the vast majority can be released with the
18 exception, for instance, of the declaration in support of the
19 motion to continue trial, maybe some redactions of certain
20 search warrant references, et cetera, et cetera. But it sounds
21 like the vast majority of this stuff can be and should be
22 released.

23 And so I would like the group -- somebody from the Group 1
24 defendants to -- to reach understanding with the Government
25 that -- exactly what it is that can be released and arrange for

1 that release. Right now, we're -- looks like we've got -- I
2 don't know -- 10 documents or something.

3 And going forward, I think that the general presumption
4 should be all defendants should receive all pleadings, unless
5 it involves the -- what we've been referring to as witness
6 safety, super AEO, the AEO Group 1 issue.

7 I understand there is an interest in lifting that totally.
8 And, obviously, that would be in some ways simpler because then
9 we don't have to do redactions and things. But I am sensitive
10 to the risk to witness safety -- just when there is multiple
11 and multiple numbers of dissemination -- when there is not
12 quite the need yet, I don't see it.

13 And, frankly, once we go to trial, this may moot all the
14 AEO stuff. I mean, you know, we're going to have open trial.

15 So -- but, I think it's fair. I did not intend -- and if
16 I misspoke or if there is something in my ruling that indicated
17 that, then I want to clarify now, that there is no reason for
18 pleadings, as a general matter, for those not to be shared with
19 counsel.

20 **MR. GOHEL:** Your Honor, just for the record, for
21 Mr. Nelson just -- our position is that we have no objection to
22 sharing pleadings; we have no objections to sharing AEO. In
23 fact, we believe that the inability -- and I know it's not for
24 this -- for today, but the inability to share AEO materials
25 with our co-counsel is actually impeding our ability to prepare

1 for trial.

2 **THE COURT:** I understand that. And that's why I say,
3 at the very least, we're going to make case-by-case exceptions.

4 So if you need to talk to Attorney X because one of these
5 overt acts or one of the enterprise pieces of evidence, and you
6 need to get some information, I understand that that's one of
7 the issues that's floating out there.

8 **MS. McCLURE:** And, Your Honor, this is Alex McClure
9 for Mr. Wendt.

10 I would just add to Mr. Gohel's comment that I think in
11 putting the burden on the Group 1 defense counsel, who are
12 really trying to sort through a lot of discovery snafus and
13 issues, trying to prepare for trial, to have us then have to
14 look at our pleadings, try to do a side-by-side comparison of,
15 say, a search warrant affidavit that now the Government has
16 designated as "Group 1 only," for us to figure out what needs
17 to be redacted and what has not been given to the rest, I think
18 is an unfair burden.

19 I would ask the Government --

20 **THE COURT:** Let me put this way: I'm going to put the
21 burden on the Government to identify what it thinks needs to be
22 redacted for witness safety reasons, but there's some things
23 that you all may want to redact, as Mr. Philipsborn indicated
24 because it has privilege stuff that you may not want.

25 So each side will get to indicate what it thinks should be

1 redacted.

2 **MS. McCLURE:** That's true, Your Honor. I know of one
3 declaration that we believe is -- that is privileged, and would
4 need trimming. But everything else, Your Honor, is really
5 the Government's designation.

6 **THE COURT:** All right. Then --

7 **MR. BARRY:** This is Kevin Barry, Your Honor.

8 The point -- the easy refutation of that is the defense
9 knows what it's citing. They know -- if they are citing the
10 completely unredacted materials, they know where it's coming
11 from and they know what it is. So they're aware of what they
12 are citing, and so the burden should be on them if they want to
13 share it, in contravention to the Court's order.

14 **THE COURT:** Well, my order now is that these documents
15 will be released, but the Government will have a chance --
16 these are the handful of documents at this point, and I don't
17 want it to grow, but these documents should be released.
18 The Government should have a chance to indicate what it wants
19 to redact, and defense counsel should have an indication of
20 what it wants to redact. And after that's done, it will be
21 released.

22 Going forward, the directive is: Everybody shares, unless
23 one party or the other thinks it should be redacted.

24 Most often, it will be the Government because it's going
25 to be -- you know, potentially AEO/witness safety matters. But

1 that's --

2 **MR. CLOUGH:** Your Honor, I appreciate the Court's
3 order there. I just want to just address, briefly, one thing.

4 There is an issue that keeps getting floated that never
5 gets totally addressed and that is the idea that Trial Group 1
6 can make case-by-case selective requests to be able to admit
7 stuff to Trial Group 2.

8 I think that's a very, very problematic position because
9 having Trial Group 1 decide what might be relevant for my
10 defendant client to know and, therefore, give me what they
11 think is relevant, as opposed to other material, creates an
12 obvious problem.

13 I don't think we need to go into that now, but I think
14 that's an issue that I, for one -- and I think Mr. Thomson has
15 already alluded to some similar things -- are going to ask
16 the Court to address in more detail. Because I think in the
17 final analysis, it is simply not possible for non-Trial Group 1
18 defendants to cooperate fully with Trial Group 1 in an
19 investigation when they don't know the full scope of the
20 evidence that's out there.

21 **THE COURT:** Well --

22 **MR. THOMSON:** Your Honor, as to these 11 items --
23 Item I being juror records, which I think Mr. Philipsborn has
24 indicated is not really relevant. As to these 11 -- now it
25 would be 10 items, could we get a due date for those to be

1 provided to us?

2 And then the only other thing that I ask is, anything else
3 that has been filed under seal or by this method that is not
4 included on this list, but that was filed up to today's date be
5 included as well, because we don't know if something else has
6 been filed. I just got these items off of the Court's, you
7 know, minute orders, you know, trying to track when they were
8 due or not.

9 I don't know if, you know, one of Group 1 defendants filed
10 some other document, or the Government filed another document.

11 So I would ask that the Court's order be that these 10
12 items, plus anything else that has been filed under the same
13 rubric, be provided to us by a date that the Court deems
14 appropriate.

15 **THE COURT:** All right. That's fair. Let's set a
16 timeline of three weeks.

17 **MR. THOMSON:** Thank you very much, Your Honor.

18 **THE COURT:** All right. Let's get to the continuance
19 matters. And I have to be careful because, obviously, some
20 things are not public. But the gist of it, I think, is public
21 and that is because of -- I'll call them -- snafus or delays
22 without necessarily attributing any ill intent, but there has
23 been problems in the release of materials and logistical
24 problems, at least as I understand it, from the perspective of
25 Mr. Wendt's counsel and, I guess, everybody else joins in that;

1 that that is has delayed their ability to investigate, to
2 conduct their investigation. And that we're essentially about
3 two months, two and a half months behind where they thought
4 they would have been had it not been for some of the delay in
5 getting all this stuff, which was supposed to have been out
6 I guess, in July.

7 Is that right?

8 Maybe I should get an update as to whether this Bates
9 stamp coordination matter has now been resolved. Maybe that's
10 the first question.

11 Where is that at, at this point?

12 **MR. WAGGENER:** This is Bob Waggener.

13 I'm probably in the best position to speak to that because
14 I talk on a daily basis to the defense discovery coordinator.

15 And as stated in Mr. Wendt's paper and some papers I filed
16 as well that there have been some significant problems in terms
17 of the Group 1 obtaining unredacted materials. There were
18 Bates stamp issues. There were watermark issues, inability to
19 have text recognition of documents that were produced.

20 So it's been a tough road, but we've -- we made some
21 progress. We now have, of the 70- -- call it the 75,000 pages
22 of Bates numbers, we now have what the Group 1 is calling a
23 pristine copy of that; meaning that we have -- everything has
24 been unredacted, it has a uniform Bates system stamping that
25 was consistent with the prior Bates stamping.

1 It is -- that was just obtained, achieved two days ago.
2 Now, we're in the process of coding that, organizing it,
3 indexing it, whatever, which is now another substantial task in
4 the hands of the discovery coordinator. So we're moving
5 forward, but it is -- has been a problem.

6 And there are some quality control issues in terms of now
7 that -- basically we got five or six different productions,
8 which then had to be combined into another production in order
9 to clean it all up. And now we're combining the newer
10 materials such that we have -- we're up to a Bates, like,
11 90,000 pages of Bates stamped stuff.

12 And now we just received an additional 30,000 pages --
13 well, 50 gigabytes -- a 50-gigabyte hard drive. It has 42
14 gigabytes of data and eight gigabytes of documentary data.
15 Roughly, that's about 30,000 pages. So now we're going to be
16 up to 125-, 130,000 pages of Bates stamped stuff.

17 So we're processing it all. It's a task. And then
18 organizing it. Some of that, the latter group of -- set of
19 materials, that 50 gigabytes, is going to all counsel. We,
20 literally, just got the 30,000 pages distributed to all counsel
21 yesterday. The 42 gigabytes of data has yet to be distributed,
22 and that's going to require hard drives out to the discovery
23 coordinator.

24 So it's a long-winded discussion on that. We could go
25 into further detail on it, but it is a work in progress. We're

1 making progress. But it's also a matter of that the processing
2 has to be done such that the lawyers -- it hasn't gotten to the
3 lawyers in the sense of getting it coded, cross-referenced,
4 indexed material for us, for our investigator such that we can
5 be comfortable that we have everything that is -- has been
6 produced that is relevant so we can make decisions in terms of
7 how we prepare our defense.

8 So that's where we are.

9 **THE COURT:** There is reference also to tape-recorded
10 interviews, phone records from certain operatives that -- that
11 remain to be produced. Do you -- are you aware of that
12 situation?

13 **MR. WAGGENER:** We recently got a distribution, on
14 September 28th, that was a -- that's a -- that's some new
15 material that included a four-and-a-half-hour recorded
16 interview of an individual. Then there are a number of phones
17 that are part of this that 50-gigabyte production that I just
18 talked about. There is a couple of phone downloads in there
19 that we had not gotten our hands on yet. There are other
20 downloads that we are still processing.

21 So, yeah, there is a significant amount of data and
22 Cellebrite reports, extractions, spreadsheets having to do with
23 devices that, again, is being processed and organized for
24 Group 1.

25 **THE COURT:** All right. Let me hear from defense

1 counsel why, although there has been some delay, there is still
2 nearly three months left before the scheduled trial date, why
3 that's not enough time.

4 **MR. NOVAK:** Your Honor, this is Richard Novak. I'll
5 jump in at this moment, unless somebody else wants to go first.

6 I think, in addition to what Mr. Waggener is managing with
7 great calm, although it is a lot of chaos, I think what
8 Mr. Nelson tried to convey in his motion to continue is that
9 it's really, really difficult for us to actually zero in on the
10 materials from these productions that we need to utilize in
11 order to prepare to meet all of the overt acts, given the chaos
12 of those materials.

13 And while I'm not trying to jump to another pleading that
14 Mr. Nelson filed under seal a couple of days ago, you know, the
15 identity of witnesses is still, for the first time, being
16 disclosed. And their statements are still being disclosed for
17 the first time. And we got a disclosure of what I would call a
18 very significant potential insider witness, literally, days
19 ago. I think it was September 20th, maybe even later.

20 And Mr. Gohel did file something on our behalf regarding
21 that.

22 So it's not just receiving the materials, but it's -- as
23 Mr. Waggener says, it's organizing them efficiently so you
24 don't have six trial attorneys combing through thousands of
25 pages to figure out what is what. We have to rely on our

1 paralegals and our coordinating -- discovery coordinator to
2 make those materials available to us in an efficient way.

3 And then what is currently the 90-day date and obviously
4 we've raised a concern that that's insufficient time, we can
5 then begin to review those very voluminous materials not, only
6 with Mr. Nelson for the first time, but with codefendants, if
7 there -- codefendants' counsel -- which raises the concern that
8 Mr. Clough addressed -- and third-party witnesses.

9 And as I pointed out in our pleading, which is under seal,
10 many of the overt acts that the Court decided the Government
11 would be permitted to present at trial do not involve
12 Mr. Nelson. He may, hypothetically, have been a member of the
13 Sonoma Charter during that time. He may have even,
14 hypothetically, been present at the time of the alleged
15 incident, but according to the Government's representations, he
16 wasn't present.

17 So we don't have -- even within the small circle of
18 Mr. Nelson and his defense team -- personal knowledge as to
19 those many events, at which -- which necessitates a huge amount
20 of interviewing witnesses, investigating the locations of
21 people who we may not be aware of at this time.

22 I mean, Your Honor knows this. It is a little bit -- it's
23 a little bit like an onion, when one can actually begin to
24 discuss matters that need to be investigated with a client, and
25 with third parties, because it always leads to layers of very

1 relevant and necessary inquiry, and investigation.

2 And so not only is the -- to summarize, not only is the
3 chaos, if I may, and the late production of usable discovery
4 delaying our ability to prepare for that a 90-day window, but
5 what can happen in that 90-day window realistically, is only a
6 fraction of what we believe needs to be able to get done.

7 And so not only do we need to move the trial date out so
8 there can be further preparation for that window -- if that
9 makes sense; if it doesn't, I'll restate it better -- but we
10 need, as I've -- as we wrote in our motion to continue, we need
11 that 90-day window to be expanded. And that's why we've asked
12 for that additional 45 days, which I think is very reasonable
13 under the circumstances.

14 And as Your Honor said, once this case goes to trial, the
15 whole AEO regimen is moot. So if -- but for the incident, as
16 Your Honor describes it, in this OSC and an errant statement in
17 a pleading by somebody, there have been no problems brought to
18 the Government's attention concerning violation of the AEO, and
19 we are, literally, within a few months of trial one way or the
20 other.

21 You know, I think that's why the date needs to be moved
22 and the AEO lift needs to be moved, and I think it's very
23 modest that the Trial Group 1 proposal is an additional
24 45 days. I mean, 45 days is 45 days, but as Your Honor knows,
25 in trial preparation, 45 days goes very quickly.

1 **MR. GOHEL:** Your Honor, can I add quickly to that?

2 I understand everyone's good faith -- obviously,
3 the Court, the Government -- regarding witness safety; I think
4 that's a given. However, in this case, I do not -- I have no
5 information that any defendant, there is a specific threat, or
6 any witness safety issues that have arisen from any witness in
7 this case -- excuse me -- any defendant in this case. I'm not
8 saying that it can't happen, but I'm saying there has been no
9 evidence in four years of such a thing.

10 The Government's claim to witness safety -- and I don't
11 want to get in too much detail, because some of it may be
12 AEO -- but if there is an alleged threat to a potential
13 witness. I would -- if it's what Mr. Barry was referring to,
14 my belief is that's not any defendant that was in this case;
15 that's some anonymous person.

16 And the other, you know, alleged glaring by a defendant in
17 this case at some event -- I believe, it was a public event --
18 seems pretty, well, speculative at best, and not attributable
19 to any of these defendants.

20 So I'm not undermining the idea of witness safety being
21 important, but I do think, in this case, in four years, no
22 defendant in this case, that's been out of custody or in
23 custody, has done anything to intimidate or harass a witness.

24 So I think it's on the -- the, you know, the Government
25 keeps saying that there's witness safety issues, but there has

1 been none in this case.

2 **THE COURT:** All right. Mr. Philipsborn, looks like
3 you were wanting to say something.

4 **MR. PHILIPSBORN:** Your Honor, it's simply to add a
5 little bit to what Mr. Novak said, and I know that the Court
6 has this also, to some degree, in writing from us.

7 But the way the discovery was distributed, and I certainly
8 understand the logic of the Court's question about why we're
9 asking for more time in view of the fact that there is a
10 certain amount of time between now and the time of trial. But
11 in the past few months, what we've been doing is getting items
12 of discovery -- and for the Wendt team, especially, as I
13 indicated in the papers that have been filed with the Court --
14 a lot of the information -- I mean, there is critically
15 important information on Mr. Wendt's alleged role in matters
16 that are charged, especially in Counts Two and Three, the Silva
17 conspiracy and the actual murder charge. And, of course, that
18 overt act, as its charged in Count One.

19 So part of the difficulty has been through now six
20 discovery dumps to try to cull out reports that have to do with
21 sources of information that pertain to Mr. Wendt to see that
22 there actually minor -- minor but very important
23 inconsistencies between the reports we get in package 4, as
24 compared with package 5.

25 And all of a sudden -- and I mention this because it

1 really made an impression on us for fairly good reason,
2 you know, one of supposed Fresno missing-in-action persons who
3 is mentioned by others as perhaps, you know, having suffered a
4 dark fate, turns out to have, actually --

5 **MR. BARRY:** Your Honor, we're getting into discussion
6 of AEO material here.

7 **THE COURT:** Right. And I understand what you're
8 talking about, Mr. Philipsborn. I know -- I read your papers,
9 so I know what you're talking about.

10 **MR. PHILIPSBORN:** But that example is actually a
11 fairly critical example, because without having -- we're
12 obviously not getting the universe of information that the
13 Government will be relying on going to trial, because it
14 rightly is -- or at least it is using its prerogative to
15 withhold Jencks Act information. And no doubt there are some
16 current interviews ongoing that we'll end up seeing at some
17 point later on.

18 But if we don't have -- I can't tell you that I know the
19 baseline of what information it is the Government thought we
20 were entitled to, as of now, that would inform Wendt of the
21 evidence that the Government wanted us to have as of now,
22 because of the level of inconsistency and some of the
23 disseminations.

24 And as Mr. Waggener has informed the Court, the intent of
25 the Government for us to have what turns out to be kind of a

1 reordered and expanded dump of the previously unredacted
2 discovery.

3 And so part of what I think my colleagues and I have been
4 trying to explain is, we've been trying to put order in this so
5 that we actually know what information it is we need to rely on
6 to have our investigators actually pursue in the field.
7 Otherwise, we would be returning to you. And I actually am in
8 the process of doing this.

9 We had people in the field relying on -- or on the
10 assumption that we had a fair percentage of the information
11 that we needed to have in hand, so we had people doing
12 fieldwork. It now turns out that what we did was only sort of
13 a very small part of the iceberg of what we should have been
14 doing. And I don't want to then have to return to the Court
15 later in the process to tell the Court that we now have
16 discovered the fact that there are yet more significant reports
17 that we should have paid attention to to inform our
18 investigation.

19 So we're really scrambling to try to put together our
20 understanding of what it is we have in hand; how it informs
21 the -- us of the information that the Government has in hand;
22 the likely witnesses we're going to see on particular incidents
23 so that we can, then, actually move forward with the
24 investigation.

25 And to think -- given the fact that we're still in the

1 process of culling, analyzing, making sure that we know what
2 our universe is, I think that's the reason that Mr. Novak has
3 explained that what the Court views as, essentially, the time,
4 the 90-plus days that we would have to do our work before the
5 bell rings, is actually a bit illusory as far as we're
6 concerned.

7 We're not yet in the position to send people into the
8 field in an informed way, with confidence that we've had access
9 to everything that we should have had access to as of now; that
10 we understand what we have in hand as of yesterday, as of now.

11 **THE COURT:** So given what you have now as of
12 yesterday, which appears to be a coherent -- I think the word
13 used is "pristine" -- in the form that had been sought, albeit
14 later than you had wanted, when would you be ready to implement
15 and execute, whether it's a 90-day plan or a 135-day --
16 whatever, assuming for now it's a 90-day plan, when would you
17 be ready to undertake the 90-day plan, given what you have now?

18 **MR. PHILIPSBORN:** And just to clarify the Court's
19 understanding, respectfully, because -- we didn't make it
20 clear.

21 The, quote/unquote, pristine set is a pristine set of
22 previously unredacted material. The 30-some-thousand pages
23 that Mr. Waggener was referencing is added to more pages of
24 materials, plus the, you know, recordings, et cetera, that
25 we're in the process of getting, those were previously

1 unredacted materials.

2 So we have, we have a, quote/unquote, pristine set that's
3 now in a position in which it can be coded, and it's being
4 coded. And it's going to be entered into a database that we
5 then, you know, can get organized information from. But
6 there's also previously unredacted material that -- that is
7 currently being provided to us in a way that it can be
8 incorporated into our database as well.

9 So the answer to the Court's question is -- I mean, we
10 made the Wendt motion, and other -- other colleagues in Group 1
11 gave an estimate of a May trial date based on our assessment of
12 how long it would take for us to get it together. And we
13 understand that the Court may not want to give us that much
14 time, but at the same time, the reality is, as the Court
15 mentioned at the beginning of this part of the hearing, we are
16 at least two-and-a-half to three months behind the point that
17 we expected to be at right now.

18 **THE COURT:** Well, all right. But it's not total time
19 lost. It's not like nothing happened in these two-and-a-half
20 months.

21 So I understand that getting what you've now gotten is
22 two months, two-and-a-half months later than what you thought,
23 had planned, but that's not to say nothing happened during that
24 period, and no preparation was being done. I understand that
25 there is some delay, but -- all right.

1 Let me hear from the Government. Why not grant some
2 continuance in view -- there has been some delay in -- in the
3 sequence of things that was necessary in order to get these
4 documents in a way that could be organized in order to lay the
5 foundation for an investigation strategy, and so -- and given
6 the time left, why shouldn't there be some continuance?

7 **MR. BARRY:** Thank you, Your Honor.

8 So the -- we've laid everything out in our papers, so I'm
9 not going to belabor those points.

10 But the fact is that a lot of the material has -- is
11 material that was produced years ago. You know, it's material
12 that could be searched. You know, if there is a question of,
13 like, a particular source, that, you know, Mr. Waggener in his
14 papers indicated that, you know, the watermark issue which was,
15 again, something he suggested, you know, was causing problems
16 with the OCR-ing. Well, that indicates that the material can
17 be scanned and has been scanned for, you know, the -- say a
18 particular defendant's name or a particular incident or a
19 particular location. So the defense has had this material for
20 a very long time.

21 The Government identified the overt acts it was going to
22 introduce in April of 2020. You know, the investigation, the
23 defense had claimed was slowed by COVID. The Court has baked
24 that into its 90-day limitation.

25 So, again, we stressed that in our filing. I'm not going

1 to repeat it.

2 But I just want to emphasize that the Court here has given
3 the defense more time than in any other RICO case in this
4 district. We have laid out the scheduling orders in other
5 cases. The defense will have more time with *Jencks* material.
6 They will have more time with the AEO embargo being lifted.
7 They will have more time pretrial to talk about this with their
8 clients. The -- you know, materials have been disclosed to the
9 defense in -- much earlier than in other cases.

10 The -- you know, the accusations, the charges in this case
11 aren't unique. They aren't so foreign to other RICO cases.
12 The defendants in those cases get the materials much closer to
13 trial. And the reason for that is that, you know, as trial
14 approaches, the risk to witnesses exponentially increases
15 because it becomes more real.

16 You know, the defendants are on trial for what could be
17 mandatory life sentences. And so, as things get up to trial,
18 as witnesses are concretely identified, that's when the risk is
19 as its most grave. So we believe that the Court should keep
20 the trial date.

21 But I do want to make -- I do want to argue one point,
22 though.

23 The Court carefully considered when it was going to lift
24 the embargo for AEO de-designation, and when witness identities
25 could be -- the information in the reports could be disclosed

1 to the clients, and it did so for very, very good reasons.

2 The defense keeps chipping away at this: Oh, we need
3 45 days. We need this. We need more time.

4 You know, almost in every hearing, in every filing they
5 are asking the Court to reconsider that. And there's -- and as
6 I indicated, the impetus for the Court's ruling on that has
7 only gotten stronger. So we urge the Court to maintain its
8 rulings, and not lift it more than the 90 days.

9 **THE COURT:** All right. Let me get a clarification.

10 With respect to the jury challenge, my understanding now
11 is that the -- this Court has -- its amendment to the jury plan
12 has been approved and -- by the Ninth Circuit that the wheels
13 is underway. I also read in the paper, I thought that the
14 census information is now out, or at least it's -- progress has
15 been made.

16 What's the timing on the jury matter, jury challenge,
17 Mr. Philipsborn?

18 **MR. PHILIPSBORN:** Your Honor, we go back to
19 Judge Beeler tomorrow to get what, at least I'm hoping, is our
20 last dollop of information.

21 We do -- we do not yet have the information disclosed
22 about the composition of the 2021 wheel or, in other words, the
23 wheel intended for the Group 1 trial. And we've also asked for
24 some other items.

25 But we're moving apace to get access to that information.

1 And our -- at least our hope is that after tomorrow we'll be in
2 a position in which we'll have access to information that can
3 be run by our experts and we can begin putting together the
4 challenge.

5 **THE COURT:** Okay. So if you do get that information,
6 if the census information is available you get the information
7 on the actual wheel that's going to apply to this case, which
8 is a 2022 wheel, you expect to have that filing within the next
9 month or so, or what's your best guess?

10 **MR. PHILIPSBORN:** Your Honor, we had hoped to have
11 clarity about when -- about the extent of the data from the
12 pertinent wheel that we would get access to, as well as having
13 a date certain by which we would have the Court's A012 reports
14 by now. So I'm hard-pressed to answer. My hope is that we
15 could file within 60 days of tomorrow, with suitable data
16 analysis.

17 I will file -- if it please the Court, I will file a
18 status report after we get the order from Judge Beeler.

19 The one thing that concerns me is, if we aren't able to
20 get access to -- if there are disputes about the extent to
21 which we get access to information from the jury wheel, we may
22 have to bring that issue to the Court -- to your attention.
23 But, hopefully, not.

24 **MS. PENG:** Your Honor, I just want to speak on this
25 briefly -- which is, you know, we are appearing before

1 Judge Beeler on a third request for jury information. The
2 Clerk's Office, as I understand, does not yet have the
3 fully-constructed wheel, as of last week, to give to
4 Mr. Philipsborn. So that's been the consistent answer, is that
5 the wheel is simply not ready yet.

6 And I understand they are very much aware that, as soon as
7 it's ready, and the A012s for the actual relevant wheel, they
8 will disclose that information to Mr. Philipsborn. And
9 the Government has not opposed that in any way.

10 So, I think, my understanding, it's not ready yet,
11 although it sounds some additional updates might have been
12 forthcoming recently. So that's where we are.

13 We're before Judge Beeler, I think, you know, not on the
14 issue of the actual information that would be pertinent to the
15 jury pool, but on some what we would consider ancillary issues
16 that are requested by Mr. Philipsborn that Judge Beeler can
17 resolve at the next hearing.

18 **THE COURT:** All right.

19 **MR. BARRY:** So, Your Honor, just on a sort of legal
20 point with that.

21 I mean, as we indicated in our filing -- and Ms. Peng just
22 stated -- you know, a lot of the complaint from the defense is
23 that we dumped -- that we haven't been given records, and those
24 records don't exist yet. But it's -- so it can't be the case
25 that, as a matter of law, no trial in the Northern District can

1 take place until the defense has had months to analyze records
2 pursuant to the wheel.

3 And I also, you know, point out that we haven't seen the
4 motion yet, but this very challenge has been defeated every
5 single time it's been raised. In fact, the most -- even
6 Mr. Philipsborn's filing indicated, quite frankly, that the
7 analysis of the representation of the jurors is, I think, it
8 was very well done, or it's quite good, or something like that.

9 But, again, you can't -- it can't be a precept that no
10 jury can take place in this district until defendants have
11 months to analyze the jury information that doesn't exist yet.

12 **THE COURT:** All right. I -- in considering the
13 four-factor test, which you've all identified with respect to a
14 motion to continue, I find that there are grounds in this
15 instance to -- for a brief continuation of the January 10th
16 trial date.

17 We are approximately, in some ways, two, two-and-a-half
18 months behind in some measure with respect to the disclosure of
19 the unredacted document production; on the other hand, it's not
20 like nothing happened and it's not like, you know, there was a
21 complete delay in everything else. It's not like the defense
22 was unable to conduct any kind of investigation.

23 I'm going to continue this to a March 14th trial. That's
24 slightly over two months. I think that is sufficient to make
25 up the time, and considering the need to ameliorate the accused

1 situation which is one of the factors here, while keeping in
2 mind the trial schedules and everything else that needs to go
3 on.

4 I also do have to keep in mind that the more we delay
5 Phase 1, Group 1, that means it could be some delay in Group 2,
6 and we do have one defendant who is in custody, and I'm well
7 aware of his due process rights. And so there are a number of
8 concerns that mitigate waiting until early summer to try this
9 case.

10 So I'm going to say a March 14th trial date, but I want to
11 do jury selection the week before, because it may take us a
12 whole week to get a jury, or it may take several days. So I
13 intend to start jury selection on the 7th. And, hopefully,
14 we'll have a jury, but we'll not begin in earnest until the
15 14th in this case.

16 And I assume the Government is still anticipating about a
17 three-month trial or less?

18 **MR. BARRY:** Or less, Your Honor, yes. A lot of it
19 depends on -- on the cross-examination and other things. But,
20 yeah, we're confident that we can get it done in that time.

21 **THE COURT:** Okay. So that leaves the question that's
22 been raised about the 90-day AEO lift period. And I share
23 the Government's concern because there is a lot of stuff there.
24 And looking at some of the materials, I think we have to be
25 very careful. I have to be very careful about lifting that

1 concern too early.

2 Also, on the other hand, I'm mindful of the complications
3 and the fact that there are now a series of witnesses, some of
4 which will -- may play a very significant role in the various
5 counts. Plus the fact that there are not only general
6 enterprise evidence that's going to be introduced, but the a
7 number of overt acts, even with the slimming down, that will
8 pertain to defendants in a manner such that some of the
9 defendants may not have any personal involvement or knowledge
10 and, therefore, we're trying sort of mini cases. It's almost
11 like trying somebody else's case on some of these overt acts.

12 And I think that adds to the complication of trying to do
13 it all within a 90-day period.

14 On the other hand, I'm very concerned about the safety
15 concern -- about the safety implications. So I'm going to
16 extend that period by 15 days. That's not what the defendants
17 want, but I think the Government's articulation of the safety
18 concerns are -- must be considered, and I think that is a fair
19 balance.

20 So the AEO will be lifted 105 days before trial begins and
21 trial begins on the 14th, so we'll have to do the math and
22 figure that out. But basically that means, I think, some time
23 in December, if I'm not mistaken. We'll have to count
24 backwards here, maybe early December or end of November or
25 something.

1 So I'm going to get out an order with new dates. I'd
2 like -- I'd like the parties to meet and confer and come up
3 with a schedule with respect to the -- what we talked about
4 earlier, sort of the exhibit list disclosure date early enough
5 so as to precipitate whatever motions in limine with respect to
6 objections to evidence.

7 I don't want to wait until the pretrial conference. There
8 is too much to be going on. Jury selection is going to be
9 complicated. I'd rather get that done earlier than later. So
10 I would like you to meet and confer to see if you can come up
11 with a schedule in that regard.

12 **MR. KRISHNAMURTHY:** Your Honor, if I might, I think
13 the prior pretrial schedule the Court ordered actually included
14 those dates. I think, under old schedule, November 1st was the
15 Government's deadline for an exhibit list. And we can
16 certainly work with the defense to propose new dates that makes
17 sense in light of this new trial date.

18 The one issue I wanted to flag, though, is that there's
19 some deadlines on those schedule that were both tied to the
20 first trial date, and are in very short order. The one that
21 I'm thinking about is the *Jencks* deadline, which I think would
22 have been October 10th, otherwise.

23 And so I wanted to confirm that our *Jencks* deadline is
24 still 90 days before the newly set trial date.

25 **THE COURT:** I'm going to make that 105 days as well,

1 so whatever, subtract -- go back from March 14th, and that will
2 be your *Jencks* date.

3 **MR. KRISHNAMURTHY:** Thank you, Your Honor.

4 **THE COURT:** There is -- and there is a motion -- also
5 there is a notion about, I think, a request by the defense to
6 withhold the motion to exclude co-conspirator or to continue or
7 revise the motion to exclude co-conspirator statements until
8 after the lift.

9 Is that still an issue?

10 **MR. NOVAK:** It is, Your Honor. This is Richard Novak
11 for Mr. Nelson.

12 What we filed was an application to vacate the deadline so
13 that those -- and to reset it so that those motions or,
14 I guess, what the Court has asked for is one all-encompassing
15 motion concerning the co-conspirator statements so that our
16 views on those things can benefit from our client and the
17 alleged co-conspirators making those statements.

18 So there are questions about the foundation for the
19 assertion. There are questions about the relevance. There's
20 questions about whether they actually are co-conspirator
21 statements under the rule.

22 And as I think we tried to -- as I think which adequately
23 pointed out, it's very difficult for us to address those issues
24 in a vacuum, and that vacuum includes the type of concerns that
25 Mr. Thomson and Mr. Clough raised.

1 So I think, in light of what the Court has structured now,
2 the motions, if any, to exclude co-conspirator statements need
3 to be filed after that -- reasonably after that 105-day date.

4 **THE COURT:** What's the Government's view of that?

5 **MR. KRISHNAMURTHY:** Your Honor, I can address this.

6 I mean, as initial matter, we were very surprised to see
7 that application to extend the dates.

8 As the Court might recall, there was a very extensive
9 back-and-forth between the parties about what information
10 the Government would provide. We provided certain information.
11 They went back to the Court and the Court ordered to us provide
12 additional information, which we did. And not once during
13 those discussions did the defense mention that their position
14 was that they couldn't litigate this issue without the input of
15 their clients.

16 And so we were a little bit surprised that they requested
17 this information, if their position was, all along, they
18 weren't going to file motions on that schedule.

19 **MR. NOVAK:** I think that it's fair for the Government
20 to say it was a surprise, but I did ask the Government what
21 their position was on our application before we filed it. And
22 the Court did, at least temporarily until today, vacate that
23 deadline.

24 I think that once we begin to look at, especially,
25 Your Honor, the non-electronic statements in terms of who

1 the Government's witnesses are who would be saying
2 "co-conspirator so-and-so said such-and-such a thing to me on
3 such-and-such a date," we, as defense counsel, realized that we
4 really can't effectively address the proffered evidence without
5 discussing it with our clients.

6 And that's why in my papers -- although, you know, one
7 could argue that it really isn't a Sixth Amendment issue -- it
8 does remind me of a chronic violation where I just simply can't
9 meet the Government's proffer without discussing it with my
10 client, at a minimum, let alone the co-conspirator -- the
11 alleged co-conspirators who supposedly told Government's
12 witness X such-and-such a thing.

13 So Mr. Krishnamurthy may be surprised that we decided that
14 we would essentially be ineffective if we tried to litigate
15 this in advance of the -- what I'll just call the AEO lifting.
16 But I think that now that the Court has -- now that we have the
17 chart. It is very extensive, as the Court knows; I attached it
18 to our joint application.

19 Now, that we have this 105-day period, I'm -- what we're
20 asking the Court to do is set a reasonable date after that
21 105-day period begins so that we can go over these alleged
22 co-conspirator statements with our clients, and with any of the
23 alleged coconspirators whose hearsay statements the Government
24 want to offer -- I mean, it's not hearsay, but whose statements
25 to witnesses the Government wants to offer.

1 So whether that's 30 or 45 days after the 105, I mean,
2 that's up to the Court. But I at least need to be able to go
3 over that very lengthy chart with my client. And I assume that
4 Mr. Ott's counsel and Mr. Wendt's counsel need to do the same.

5 And we've -- given who is listed in that chart, we're
6 going to need to see if we can speak with some or all of those
7 alleged co-conspirators. Some are defendants and some are what
8 the Government calls unindicted co-conspirators.

9 **THE COURT:** All right. Mr. Krishnamurthy, could you
10 respond to the substantive -- I understand sort of the surprise
11 thing, because that hadn't been raised when the defense asked
12 for greater detail. But what about the merits of this
13 question, that it seems logical that in order to meet and try
14 to defeat a claim of co-conspirator statements admissibility,
15 that being able to talk to the client might be helpful to
16 understand the context and to rebut some of that?

17 **MR. KRISHNAMURTHY:** Yes, Your Honor.

18 And I think that the concerns have to be placed in sort of
19 two categories. One is -- which Mr. Novak just raised -- the
20 possibility that some of those co-conspirators are going to say
21 that they never said those things at all, which I don't think
22 is properly litigated in this sort of a motion in limine.

23 If their response is going to be that they never said
24 that, or our witnesses are incorrect or lying, I mean, that's
25 going to be an issue that comes out at trial.

1 Second, I think --

2 THE COURT: I think the issue is more of whether it
3 was in furtherance. I mean, that's going to be the key here,
4 whether some statement was done in furtherance. So you need
5 context. You need to understand. You know, somebody might
6 say, you know: No, well, that statement was a really referring
7 to X, not to Y.

8 I mean -- so I assume that's the issue.

9 MR. KRISHNAMURTHY: Right. And that's why I said that
10 there's two categories. The first is the point that I
11 previously made.

12 As far as the context, it may be that there are, in some
13 cases, additional context is necessary. But when I think
14 the Court first looked at this chart at the last hearing, or
15 maybe two hearings ago, the Court noted that some of the
16 context is sort of evident from the face of the statements.

17 And so, at the very least, I think the defense should be
18 required to segregate those segments that they think can't be
19 litigated without the input of clients, and we should go
20 forward on the rest of them sooner than that.

21 You know, I don't know that there is going to be an
22 all-encompassing motion that the defense can bring. Because,
23 as the Court knows, additional statements are going to come out
24 as we prep for trial and, potentially, even on the stand from
25 people we haven't met with yet. And so this issue is probably

1 going to be a recurring issue as we get closer to trial.

2 **THE COURT:** Well, the other question is: What's the
3 harm in delaying the filing to -- and I'm getting a couple of
4 chat messages here from different angles, and everybody seems
5 to agree that my 105 days is November 29th.

6 So what's the harm in having that motion deferred, finally
7 deferred until, you know, some time after that, and then having
8 it heard probably in January, it sounds like, at this rate?

9 **MR. KRISHNAMURTHY:** Your Honor, the only -- the only
10 harm is that I think we tried to construct a schedule prior --
11 you know, with the January trial date in mind, that allowed all
12 the parties and the Court time to litigate these issues in an
13 orderly process.

14 And I feel like we're sort of creeping into the situation
15 where, like, nothing is going to get done until that 105-day
16 window, which I think is going to be very difficult for all the
17 parties and the Court.

18 **THE COURT:** All right. I'm going to allow -- because
19 I've now extended and elongated the trial schedule and this AEO
20 period a bit, I'm going to allow the motion to exclude to be
21 filed.

22 I would like you all to stipulate that as to part of the
23 schedule. And what I want the parties to do is, with the new
24 trial dates, give me a new scheduling and include, build in
25 the -- a new date for the motion and hearing on the motion to

1 exclude co-conspirator statements.

2 I would like to have that heard as early as possible. I
3 don't want to save everything to the end. On the other hand,
4 there is going to be some period of time in there, so I'm
5 forecasting this looks like, perhaps, an early January or
6 something around that period hearing, on the co-conspirator
7 stuff.

8 And then I don't know what you can stipulate to on the
9 motions in limine with respect to the exhibit list. But I want
10 to use those early months to try to resolve as many as of
11 fact -- as many of the evidentiary issues as possible before we
12 get into the pretrial stuff in earnest, because there's going
13 to be a lot in terms of jury instructions and everything else.

14 So I'm going to direct the parties to meet and confer, and
15 come up with a joint schedule; but I do want to hear that
16 motion to exclude on the early side.

17 So I'll let you figure that out. Okay?

18 **MR. NOVAK:** Thank you.

19 **THE COURT:** All right. Is there anything else that we
20 need to cover before I go into in camera hearings?

21 **MR. GOHEL:** Your Honor, this is Jai Gohel for
22 Mr. Nelson.

23 Can I inquire with the Court what the Court is
24 contemplating for a trial schedule, like, the week, you know,
25 what days the trial will be in session and what times, if

1 the Court knows.

2 THE COURT: Yeah. My usual schedule is 8:30 to 1:30,
3 Thursday -- except for Thursday; Thursdays are dark. But we're
4 in trial Monday, Tuesday, Wednesday, and Friday.

5 MR. GOHEL: Okay. A second issue, Your Honor, is
6 there was something filed today -- I think today or yesterday,
7 by Mr. Barry regarding a reconsideration. I don't want to go
8 into more detail, because I think it's based on AEO.

9 THE COURT: Yeah.

10 MR. GOHEL: I would like the opportunity to respond in
11 writing --

12 THE COURT: Yeah.

13 MR. GOHEL: -- if the Court is considering it.

14 THE COURT: I'm sorry. What was that?

15 MR. GOHEL: If the Court is considering the
16 reconsideration, I would like a chance to respond in writing.

17 THE COURT: Yeah. Can you file something -- I don't
18 know. When can you file something?

19 MR. GOHEL: By Monday.

20 THE COURT: Okay. That's fine.

21 And I'll, then, take it under submission. If I need
22 argument, we'll schedule something; otherwise, I'll do it on
23 the papers.

24 MR. GOHEL: Thank you, Your Honor.

25 THE COURT: All right?

1 **MR. GOHEL:** Yes, Your Honor.

2 **THE COURT:** Okay. So I've got two matters under seal
3 that we've got to go to.

4 I think Angie has sent out -- Angie, have you sent out the
5 information?

6 **THE CLERK:** I am sending right now.

7 **THE COURT:** Okay. Why don't we set the Ott matter
8 first.

9 **THE CLERK:** Okay. Okay.

10 **THE COURT:** And we'll take the other one after that.

11 So, I guess, just stay tuned for an e-mail when your turn
12 is up.

13 **MR. NOVAK:** Before we all leave, Your Honor, did
14 the Court want to set another status conference?

15 **THE COURT:** Yes. Yes, we do.

16 Maybe we should set one around the time that the AEO date
17 the lift date -- let's see -- or shortly after that.

18 **THE CLERK:** Your Honor, we could set either the day
19 before Thanksgiving or possibly November 30th. I would have to
20 rearrange November 30th in the morning.

21 I will need to look at the classroom schedule.

22 One minute.

23 **THE COURT:** Okay.

24 (Pause in proceedings.)

25 **THE CLERK:** For the week of November 22nd, we do not

1 have the classroom available.

2 THE COURT: The following week.

3 THE CLERK: The following week, we have the classroom
4 available for December 1st in the morning, but we have trial
5 that day.

6 THE COURT: Oh, yeah.

7 THE CLERK: Jury selection.

8 THE COURT: The 30th is not available?

9 THE CLERK: It's not available for the classroom. Let
10 me check on the Friday. It could be available. I'm not sure.

11 THE COURT: That Friday, I have a -- I can't do it
12 that Friday. I'm not available. I have a conference.

13 THE CLERK: Okay. Then the only availability for that
14 week for the classroom would be December 1st in the morning,
15 but we have a jury selection at that time.

16 THE COURT: What about the week after?

17 THE CLERK: Okay. Let's see. The week after
18 December 10th, that is an open classroom schedule. That's the
19 Friday, either morning or afternoon.

20 THE COURT: Why don't we take the afternoon. Then it
21 won't interfere with the trial.

22 THE CLERK: Okay. December 10th at 1:00 p.m.

23 THE COURT: Can we do it at 1:30?

24 THE CLERK: 1:30.

25 THE COURT: The trial runs until 1:30. Okay?

1 **THE CLERK:** Okay.

2 **THE COURT:** December 10th, 1:30.

3 And no objection to exclusion of time?

4 **MR. NOVAK:** No objection.

5 **THE COURT:** Hearing none, I will exclude time between
6 now and the next calling of the case, which is December 10th,
7 on the grounds that time is needed for effective preparation of
8 defense.

9 Also, we have new counsel for Mr. Foakes, so continuity of
10 counsel. And we have already designated this case as complex.
11 I find that the ends of justice outweighs the public's and the
12 defendants' interest in a speedy trial. And so we will -- if,
13 Mr. Barry, someone on your team can prepare an exclusion order,
14 for the record, I would appreciate that.

15 So otherwise, we'll see you on the 10th, and we'll take
16 the next matter in camera. Okay? Thanks everyone.

17 **THE CLERK:** Court is adjourned.

18 (Proceedings adjourned at 10:36 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, December 10, 2021

A handwritten signature in blue ink, reading "Ruth Levine Ekhaus", followed by a horizontal line.

Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court